STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED April 12, 2011
v	No. 295590 Van Buren Circuit Court
LYLE TIMOTHY STOVER, Defendant-Appellant.	LC No. 09-016513-FC

Before: O'CONNELL, P.J., and K. F. KELLY and RONAYNE KRAUSE, JJ.

PER CURIAM.

Defendant appeals as of right from his jury convictions of possession of methamphetamine, MCL 333.7403(2)(b)(i), and possession of less than 25 grams of cocaine, MCL 333.7403(2)(a)(v), for which he was sentenced as a fourth habitual offender, MCL 769.12, to concurrent prison terms of 46 months to 20 years and 34 months to 15 years, respectively. We affirm.

Law enforcement officials received an anonymous tip that defendant was driving with a suspended license. The tip did not mention controlled substances, but it did describe defendant and the vehicle he was driving. Acting on that tip, officers stopped defendant when he drove past their position. One of the officers noticed defendant apparently trying to move something in the vehicle. Rolling papers were found on the vehicle's passenger seat, a bag of marijuana was found in defendant's pocket, and a metal pipe of the kind used to smoke marijuana or methamphetamine fell out of defendant's pant leg when he was patted down. Defendant could not sit still in the vehicle, talked very fast, and had uncontrollable body movements. When questioned, defendant indicated that he had Attention Deficit Disorder (ADD). The pipe contained visible residue. Laboratory analysis determined that the residue contained methamphetamine and cocaine. The residue was of insufficient quantity to be weighed.

On appeal, defendant argues that the unweighable trace residue on the pipe were insufficient to establish knowing possession of the controlled substances. We disagree.

When reviewing a sufficiency of the evidence challenge, we review the evidence de novo in a light most favorable to the prosecution to determine whether any rational trier of fact could have found that the elements of the charged offense were proven beyond a reasonable doubt. *People v Lundy*, 467 Mich 254, 257; 650 NW2d 332 (2002); *People v Wolfe*, 440 Mich 508, 513-515; 489 NW2d 748, amended 441 Mich 1201 (1992). It is the jury's role to determine the

weight of the evidence and the credibility of the witnesses. *People v Avant*, 235 Mich App 499, 506; 597 NW2d 864 (1999). A person does not possess drugs simply because drugs are found in that person's vicinity without some additional connection to them as shown by the totality of the circumstances. *Wolfe*, 440 Mich at 520. The issue is whether the defendant had dominion or control over them with knowledge of its presence and character. *People v Konrad*, 449 Mich 263, 271; 536 NW2d 517 (1995). The prosecution need not rebut every theory consistent with the defendant's innocence, but rather must "merely introduce evidence sufficient to convince a reasonable jury in the face of whatever contradictory evidence the defendant may provide." *Id*. at 273 n 6.

A small amount of heroin residue, visible to the naked eye on the interior of a bottle cap, has been found sufficient to support a conviction of possession of a controlled substance. *People v Harrington*, 396 Mich 33, 37, 42, 49; 238 NW2d 20 (1976). Although the residue "was part of paraphernalia which, arguably, might have been the only thing defendant thought he was hiding, the white encrustation was there for him to see[]" and "[t]herefore, the *mens rea* threshold was successfully crossed by the prosecution." *Id*. at 49 (emphasis in original).

Defendant argues that this Court's more recent case of *People v Hunten*, 115 Mich App 167; 320 NW2d 68 (1982), precludes a finding of scienter here. We disagree because *Hunten* is significantly distinguishable. In that case, a syringe found on the defendant was tested and found to contain a controlled substance, but in an amount so small that it was invisible to the naked eye and only discoverable through a laboratory analysis. There was no other evidence in that case to show that the defendant was aware of the controlled substance. This Court concluded that an invisible amount, standing alone, could not establish that the defendant was aware of it. *Id*. at 170-171. In contrast, the residues in *Harrington* and in this case were visible. This evidence was sufficient to support an inference of criminal scienter. *Harrington*, 396 Mich at 33, 37, 42, 49. Sufficient evidence supported defendant's convictions. *Wolfe*, 440 Mich at 513-515; *Cline*, 276 Mich App at 642.

Next, defendant argues that his due process rights to a fair and impartial jury were violated when the trial court failed to give prospective jurors the proper oath before jury selection. We disagree.

Defendant failed to object to this omission on the record; therefore, this issue is unpreserved and forfeited on appeal. *People v Carines*, 460 Mich 750, 762 n 7, 763-765; 597 NW2d 130 (1999). We review unpreserved challenges to jury instructions for plain error affecting the defendant's substantial rights. Reversal is required only when the plain, forfeited error resulted in the conviction of an actually innocent defendant or when an error seriously affects the fairness, integrity or public reputation of judicial proceedings independent of the defendant's innocence. *Id*. at 763-764.

A defendant has a due process right to a fair and impartial jury in a state criminal trial. US Const, Am XIV; *Groppi v Wisconsin*, 400 US 505, 509; 91 S Ct 490; 27 L Ed 2d 571 (1971). "Before beginning the jury selection process, the court *should* give the prospective jurors appropriate preliminary instructions and must have them sworn." MCR 6.412(B) (emphasis added).

A defendant's right to be tried by an impartial jury is constitutionally guaranteed. *People v Pribble*, 72 Mich App 219, 224; 249 NW2d 363 (1976). The jury oath is administered in order to insure that the jurors pay attention to the evidence, observe the credibility and demeanor of the witnesses and conduct themselves at all times as one would expect of those holding such a responsible position. *Id*. Failure to administer the juror oath prior to the start of trial as required by MCL 768.14 denies a defendant his right to an impartial jury. *Id*. at 221-224.

Unlike *Pribble*, which involved a failure to administer the required jury oath before trial began, the instant case involved a failure to administer the pre-voir dire oath required by MCR 6.412(B). This failure is not structural error requiring automatic reversal without a showing of prejudice. *People v Anderson (After Remand)*, 446 Mich 392, 404-405; 521 NW2d 538 (1994). "A structural error is a 'fundamental *constitutional* error[] that 'def[ies] analysis by "harmless error" standards.'" *People v Miller*, 482 Mich 540, 556; 759 NW2d 850 (2008), quoting *Neder v United States*, 527 US 1, 7; 119 S Ct 1827; 144 L Ed 2d 35 (1995) (emphasis in original).

Although the venire panel was not sworn in compliance with MCR 6.412(B), the trial court administered the oath required by MCL 768.14 after the jury was selected and before the trial began. Defendant does not argue there was any error in this oath. See *Pribble*, 72 Mich App at 225. Defendant fails to demonstrate that the jurors were untruthful or partial, or concealed information during voir dire. Thus, defendant is unable to prove that the trial court's failure to administer the pre-selection oath constituted plain error. *Carines*, 460 Mich at 763-764.

In the alternative, defendant argues that trial counsel was ineffective for failing to object to the trial court's failure to administer the oath required by MCR 6.412(B). We disagree. To establish ineffective assistance of counsel, defendant must, among other things, show a reasonable probability that the proceedings would have resulted in a different outcome. See *Strickland v Washington*, 466 US 668, 688, 694; 104 S Ct 2052; 80 L Ed 2d 674 (1984); *People v Odom*, 276 Mich App 407, 415; 740 NW2d 557 (2007). Even if counsel failed to perform an essential duty by failing to object, defendant cannot establish prejudice. *People v Reinhardt*, 167 Mich App 584, 591; 423 NW2d 275 (1988). Defendant has not shown that any juror was untruthful, partial, or concealed information during voir dire. Accordingly, the failure to administer the pre-selection oath was not prejudicial to defendant and does not constitute ineffective assistance of counsel. *Strickland*, 466 US at 688, 694; *Odom*, 276 Mich App at 415.

Affirmed.

/s/ Peter D. O'Connell
/s/ Kristen Frank Kelly
/s/ Amy Ronayne Krause